To be Argued by:
ORRIE LEVY
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Plaintiff-Appellant,

Appellate Case Nos.: 2021-02971 2021-04034

– against –

WESTPORT INSURANCE CORPORATION,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

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Appellant Consolidated Restaurant Operations, Inc. ("CRO") respectfully submits this brief in support of its appeal from the New York State Supreme Court, New York County's Decision and Order dated August 4, 2021, granting the Motion to Dismiss of Defendant Westport Insurance Corporation ("Westport"), and the Decision and Order dated September 23, 2021, denying its Motion for Reargument and, in the Alternative, to Amend Its Complaint.

QUESTIONS PRESENTED

1. Whether the trial court erred in holding that CRO failed to sufficiently allege "physical loss or damage," where the complaint alleges that the actual presence of a dangerous, physical virus (SARS-CoV-2) and its associated disease (COVID-19) on the insured properties altered the properties, impaired their functionality, and rendered them unusable for their intended purpose?

2. Whether the trial court erred in denying CRO's Motion for Reargument?

3. Whether the trial court erred in denying CRO's Motion for Leave to Amend Its Complaint?

PRELIMINARY STATEMENT

CRO owns and operates dozens of restaurants that were forced to partially or completely close as a result of the actual and imminent threat of SARS-CoV-2 – a physical, highly contagious and deadly respiratory virus that causes COVID-19 disease – in and on its insured properties, which altered those properties, impaired

their functionality, and rendered them unusable for their intended function. When Westport, CRO's property and business interruption insurer, denied coverage for its resulting losses, CRO was forced to sue Westport to secure the coverage to which it was entitled. The trial court, however, dismissed CRO's complaint on the ground that it had failed to sufficiently allege "physical loss or damage" under CRO's "all risks" insurance policy. And when CRO sought leave to amend its complaint to address the very issues the court had raised, the court erroneously denied CRO's motion.

In reaching these conclusions, the trial court committed numerous reversible errors, including (1) misapplying this Court's holding in *Roundabout Theatre Co. v. Continental Casualty Co*., 302 A.D.2d 1 (1st Dep't 2002), (2) improperly resolving disputed factual issues in favor of Westport rather than accepting CRO's allegations as true and construing all reasonable inferences in its favor, (3) measuring CRO's allegations against the court's own views of the facts and science without receiving or considering scientific evidence, and (4) failing to adhere to New York's liberal pleading amendment standard. Each of these errors warrants reversal; taken together, they reflect a stark departure from New York's pleading standard, amendment standard, and bedrock principles of insurance policy interpretation.

This appeal presents an issue of first impression in this Court: whether a policyholder's allegation that the actual presence of a dangerous, physical substance

in and on insured property, which alters the air and surfaces within that property and prevents its intended function, is sufficient to plead "physical loss or damage" under an "all risks" property and business interruption insurance policy. For decades, courts across the county have answered this question in the affirmative, finding that the presence of substances such as radiation, carbon monoxide, asbestos, ammonia, and E.coli bacteria can cause physical loss or damage. Indeed, the few New York courts – including the Second Department – to have touched on this issue, have reached the same conclusion. This makes sense given that those substances are physical in nature and their presence can destroy the functionality of property.

Many courts around the nation have applied this same standard in the COVID-19 context, denying insurers' motions to dismiss where the policyholder alleged that the actual presence of the virus impaired the intended function of its properties. These cases – both those addressing dangerous substances generally, and those addressing COVID-19 in particular – premised their holdings on numerous factors, including (1) the plain meaning of the undefined terms "physical loss or damage," (2) that a reasonable insured who purchased an "all risks" business interruption insurance policy can read the words "physical loss or damage" to encompass the loss of functionality of property due to the presence of a dangerous, physical substance, (3) that courts have begged the insurance industry for years to clarify these undefined words to no avail, (4) other terms and conditions of these policies, such as coverage

for physical loss or damage caused by radiation, make clear that these policies are intended to cover losses caused by dangerous, yet invisible substances, and (5) that insurers went to great lengths to expressly exclude coverage for losses caused by viruses after the original SARS pandemic through a standard virus exclusion, but chose not to include that exclusion in certain of their policies, like the policy at issue in this appeal.

CRO's allegations fall squarely into this well-established authority. Nevertheless, rather than accept its pleadings as true, construe all reasonable inferences in CRO's favor, and rely on the decades of case law demonstrating why dismissal was inappropriate here, the trial court dismissed CRO's complaint based on an erroneous view of the facts and the law.

First, the court determined that it was bound by this Court's decision in *Roundabout* to dismiss CRO's complaint. Yet, *Roundabout* involved a claim of insurance coverage solely for economic losses untethered to any physical impact to insured property. As the Court in *Roundabout* explained, that case was about "off-site" property damage to non-insured property in the vicinity of a fully functional insured property. It had nothing to do with an "on-site" physical impact by noxious substances that directly impaired the physical function of insured property, like the damage and loss that CRO suffered. Thus, *Roundabout* has no bearing on the question of insurance coverage at issue here.

Second, the court ignored the applicable pleading standard by challenging the scientific plausibility of CRO's allegations based on the court's own unsubstantiated theories, despite there being no scientific or expert evidence in the record and contrary to CRO's factual pleadings. The court's approach is particularly problematic in the context of COVID-19, where the science is highly complex and constantly evolving, and where it is critical that laypersons (judges and lawyers included) refrain from engaging in amateur epidemiology.

Compounding this error, the court suggested that CRO could not establish physical loss or damage based on a series of hypotheticals with no basis in the record – such as that CRO could have simply kept all patrons out of its restaurants, easily cleaned away any trace of COVID-19, or tested every single patron prior to their entry at a time when tests for COVID-19 were not even widely available. But just as an insured cannot airlift its property to a safer location to avoid a hurricane, CRO could not alter the real-world constraints posed by a rapidly-spreading virus.

Third, because the court questioned various aspects of CRO's allegations, and because both the science of COVID-19 and CRO's understanding of its losses had evolved from when it initially filed its complaint, CRO sought leave to amend its complaint to bolster its allegations with additional scientific and factual evidence. For example, in its proposed amended complaint, CRO alleged, among other things, that the coronavirus has numerous modes of transmission, pervaded the air at CRO's

properties and attached to insured property at those premises (including specifically, chairs, tables, and countertops), altered the air and surfaces to which it attached, resists routine cleaning, and directly impaired the physical function and habitability of CRO's properties for their intended purpose, i.e., in-person dining.

Despite these robust allegations, which certainly plead "physical loss or damage to property" as would be understood by an ordinary and reasonable businessperson, the trial court found that amendment would be futile. In addition to contradicting New York's liberal pleading amendment standard, the court's denial of leave highlights the core error from which all of its other errors flow – its incorrect assessment that SARS-CoV-2 and COVID-19 can never cause "physical loss or damage" as a matter of New York law.

Finally, although the court's ruling was limited to the issue of "physical loss or damage," Westport also asserted that a series of exclusions in the policy bar coverage. Specifically, although Westport failed to include in the policy a standard and widely available virus exclusion, it sought to achieve the same effect through a series of exclusions that have no applicability here.

Because CRO sufficiently alleged "physical loss or damage," and because Westport has failed to prove that any exclusion unambiguously applies to bar coverage, the Court should vacate the trial court's judgment and remand with instructions to permit CRO's amendment and proceed with the case.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Coronavirus is a Dangerous, Physical Substance that Alters and Impacts Property

The coronavirus is a deadly and highly contagious respiratory virus that has resulted in a global pandemic, infected hundreds of millions of people around the world, and killed more than 700,000 people in the United States.[1] R-54-55, ¶¶ 12-17; R-1932-33, 1936, ¶¶ 13-16, 26. Even when it does not cause death, the virus can lead to severe illness with long-term debilitating effects. It is a physical substance carried and spread through physical droplets and airborne respiratory particles, pervades and attaches to property, survives on property for weeks, is resilient, and is challenging to contain. R-54-56, ¶¶ 12-21; R-1932-38, ¶¶ 13-30.

Indeed, the coronavirus has multiple modes of transmission, including airborne transmission through physical droplets, and transmission through human contact with the virus on physical objects. R-54-55, ¶¶ 14-15; R-1933-34, ¶¶ 16-21. Moreover, it can spread through asymptomatic and pre-symptomatic individuals (thus making it effectively impossible to identify and segregate infectious persons from non-infectious persons), cannot be entirely removed through cleaning, physically alters the air, and attaches to and alters physical surfaces by turning them into fomites – vectors for infection. R-54-56, ¶¶ 14-21; R-1932-38, ¶¶ 13-31.

[1] At the time CRO filed its original complaint, approximately 150,000 Americans had died from the coronavirus. By the time CRO sought leave to file an amended complaint, more than 620,000 Americans have died from the coronavirus. At present, that number exceeds 700,000. *See https://covid.cdc.gov/covid-data-tracker/#datatracker-home*.

B. CRO Suffered Massive Losses as a Result of the Physical Presence of the Coronavirus at its Restaurants and Resulting Governmental Orders

CRO is a global restaurant group, operating more than 27 full-service and 27 franchise restaurants in 12 states and the United Arab Emirates (the "Restaurants"). R-51, ¶ 2; R-1930, ¶ 2. To maintain its globally recognized Restaurants, CRO employed more than 3,200 full and part-time employees to serve more than 7 million meals annually. R-51, ¶ 2; R-1930, ¶ 2. The core function of CRO's Restaurants, and the linchpin of its business model, is to offer in-person dining services to its customers. R-51, 59, 60, ¶¶ 4, 31, 34-35; R-1929-30, 1941, 1943, ¶¶ 3-4, 42, 48.

Beginning in early-March 2020, the impact of the coronavirus was severely felt by CRO. R-51, 58, ¶¶ 3, 26; R-1929-30, 1939-40, ¶¶ 3-4, 35-37. In the blink of an eye, the Restaurants were forced to suspend indoor operations due to the presence of the virus, the continuing threat of the virus, and resulting stay-at-home orders (the "Orders") that went into effect at every location that CRO maintained a Restaurant. R-51-52, 59-60, ¶¶ 3-4, 29-33, 36; R-1929-30, 1940, 1944, ¶¶ 3-4, 37-39, 52. Certain of the Orders explained that the restrictions they imposed were needed, in part, because of the virus's propensity to cause property damage. R-51, ¶ 3; R-1929, 1940, ¶¶ 3, 38. Even after the restrictions imposed by the Orders were relaxed, CRO still operated its Restaurants on a severely restricted basis. R-59-60, ¶¶ 29-33; R-

1938-40, ¶¶ 32-39. This resulted in massive losses to CRO. R-52, 60-61, ¶¶ 4, 34-38; R-1930, 1944, ¶¶ 5, 54.

Specifically, beginning in February/March of 2020, the virus was present in the air within the Restaurants and on the surfaces of Restaurant property, and thereby physically altered numerous items of insured property by combining dangerous viral RNA with air that previously was normal to breathe and surfaces that previously were safe to touch. R-60, 68, ¶¶ 36, 61; R-1941, ¶¶ 41-42. Thereafter, the virus was continually reintroduced into the Restaurants. R-1941, ¶ 41. To curb the presence of the virus at the Restaurants, repair the Restaurants, and protect its property, employees, and customers, CRO undertook remedial measures, including adding physical partitions at the Restaurants, physically reconfiguring layouts, and commencing construction to add ventilators and purifiers. R-1941-42, ¶¶ 42-45. Additionally, CRO implemented stringent and continuous cleaning procedures, including adding extra cleaning stations and hand sanitizer mounts, which were not used or necessary before SARS-CoV-2 and COVID-19 struck. *Id*.

Nevertheless, the virus is resilient and is not susceptible to routine cleaning and disinfecting. R-60, ¶ 20; R-1934, 1936, 1937, 1938, 1942, ¶¶ 21, 26, 28, 29, 46. Even extraordinary cleaning measures do not completely remove the virus from surfaces. R-1938, ¶ 29. Thus, despite CRO's best efforts to maintain a safe and clean environment and curb the spread of the virus, the virus could not be completely

eliminated from its Restaurants or prevented from causing physical loss or damage to surfaces and air within the Restaurants. R-1942-43, ¶¶ 46-47. As a result of these physical impacts of the virus and the dangers to human health that they created in the insured physical property of the Restaurants, CRO was forced to close its doors to the indoor, in-person dining experience which is the lifeblood of CRO's business. R-1942-43, 1944, ¶¶ 46-47, 51.

Therefore, as a result of the actual presence of the coronavirus, the imminent threats to human health created by the coronavirus, and the Orders – which in turn resulted from physical loss or damage caused by the coronavirus to property throughout the regions in which the Restaurants are located – CRO closed 30 restaurants, exited five states entirely, could not use its properties for in-person dining for an extended period, and was forced to severely restrict its operations. R-59, 60, ¶¶ 31, 35; R-1941, 1943, ¶¶ 41-42, 49-50.

C. The Westport All-Risk Policy

As a prudent business owner, CRO had the foresight to protect its property and business income by purchasing "all risks" property insurance, including business interruption coverage, from Westport with a $50 million per-occurrence limit, subject to various sublimits, time limits, and waiting periods for certain coverages (the "Policy"). R-52, 61, ¶¶ 5, 39-40; R-1930, 1944-45, ¶¶ 6, 55-56. As relevant here, the Policy covers "all risks of direct physical loss or damage to insured

property," meaning that the Policy covers all risks unless specifically excluded. R-62, ¶ 43; R-1945, ¶ 60.

The Policy also provides various time-element coverages and "extensions" following physical loss or damage to CRO's property or other nearby property, R-62-66, ¶¶ 46-54; R-1946-49, ¶¶ 63-71, including but limited to:

- "Gross Earnings" – "recovery . . . to the extent the Insured is: (a) wholly or partially prevented from producing goods or continuing business operations or services . . . ." R-62, ¶ 46; R-1946, ¶ 63 & n.20.[2]

- "Extra Expenses" – "the reasonable and necessary extra costs incurred by [CRO] . . . as respects . . . extra costs to temporarily continue as nearly normal as practicable the conduct of [CRO's] business." R-62, ¶ 46 n.8; R-1946, ¶ 63 n.21.

- "Contingent Time Element Losses" – losses "incurred by [CRO] . . . directly resulting from direct physical loss or damage . . . to any property . . . at any location(s) of suppliers or customers, provided that such physical loss or damage prevents: I. such suppliers from supplying goods or services directly or indirectly to [CRO]; II. such customers from receiving goods or services directly or indirectly from [CRO]." R-64, ¶ 50; R-1947, ¶ 67.

- "Ingress/Egress" – losses "incurred by [CRO] due to the necessary Interruption of [CRO's] business, provided that: (a) the interruption directly results from the prevention of direct ingress to or direct egress from insured location(s), whether or not insured property at such insured location(s) is damaged; and (b) the prevention above is caused by direct physical loss or damage as insured by th[e] policy to any property, including property excluded under Property Not Insured." R-64, ¶ 51; R-1947-48, ¶ 68.

[2] The Policy also provides coverage for losses related to rental insurance, R-62, ¶ 46 n.9; R-1946, ¶ 63 n.22, attraction properties, R-63, ¶ 48; R-1947, ¶ 65, royalty, licensing fee, franchise fee, or commission agreements, R-63, ¶ 49; R-1947, ¶ 66, suppliers or customers, R-63, ¶ 47; R-1947, ¶ 67, and leasehold interests, R-65, ¶ 53; R-1948, ¶ 70.

- "Communicable Disease Losses" – "If an insured location owned, leased or rented by [CRO] has the actual not suspected presence of communicable disease and access to such insured location is limited, restricted or prohibited by: (a) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or (b) a decision of an Officer of [CRO] as a result of the actual not suspected presence of communicable disease, th[e] policy is extended to insure loss . . . incurred by [CRO] . . . at such insured location with the actual not suspected presence of communicable disease." R-64-65, ¶ 52; R-1948, ¶ 69.

- "Order of Civil or Military Authority Losses" – losses "incurred by [CRO] due to the necessary interruption of [CRO's] business, provided that: (a) the interruption directly results from an order of a civil or military authority that prohibits partial or total access to insured location(s); and (b) the order referenced above is caused by direct physical loss or damage as insured by th[e] policy to property, including property excluded under Property Not Insured." R-66, ¶ 54; R-1949, ¶ 71.

Crucially, the Policy does not contain the broad ISO Virus Exclusion that has been widely available and used in the insurance market since 2006. R-69-70, ¶ 66; R-1952-53, ¶ 86. That exclusion provides that the insurer "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." R-69-70, ¶ 66; R-1952-53, ¶ 86. CRO paid for a policy from Westport that does not include this exclusion

D. Westport's Denial of CRO's Claim

CRO provided notice of its claim to Westport on April 16, 2020. R-67, ¶ 58; R-1951, ¶ 77. Westport, however, denied coverage on July 13, 2020, stating, "[t]he

actual or suspected presence of the severe acute respiratory syndrome coronavirus 2 ('SARS CoV-2') responsible for coronavirus disease 2019 ('COVID- 19') does not constitute physical loss or damage to property." R-68, ¶ 60; R-1951, ¶ 79. Instead, Westport indicated its view that if the Policy afforded any coverage, it would be limited to two Communicable Disease provisions which have a $250,000 combined sublimit.[3] R-68, ¶ 62; R-1951-52, ¶ 81.

E. Procedural History

On August 5, 2020, CRO filed the instant action, in New York State Supreme Court, Westchester County, for declaratory relief as well as damages for breach of contract arising out of Westport's repudiation of its contractual duty to pay claims for direct physical loss or damage to property stemming from the coronavirus. R-49-165. On October 16, 2020, Westport filed a motion to transfer venue to the New York State Supreme Court, New York County. While the motion to transfer venue was pending, Westport filed a motion to dismiss CRO's complaint and supporting memorandum on October 28, 2020. R-166-657. CRO filed its opposition brief on November 20, 2020, and Westport filed its reply on December 10, 2020. R-658-1247, 1248-1446. A day later, on December 11, 2020, the Westchester County court granted Westport's motion to transfer venue to New York County. Subsequently,

[3] Westport also stated that CRO's claim fell into the contamination and microorganism exclusions. R-69, ¶ 64; R-1952, ¶ 83.

the New York County court allowed both parties to provide supplemental briefings on Westport's motion to dismiss. R-1447-1731, 1732-1742.

On August 4, 2021, the New York County court heard oral argument on Westport's motion to dismiss CRO's complaint. In the course of the court's questioning regarding whether CRO had sufficiently alleged physical loss or damage, it made various observations and asked numerous questions based on factual theories and scientific conclusions, despite there being no record yet in this case, let alone expert evidence and testimony. For example:

- The court questioned the particular property that the coronavirus attached to, despite CRO's allegations that the virus was actually present in the Restaurants. R-11:10-14; 12:20-13:2; 13:6-9.

- The court suggested that CRO "could wipe down the tables every two minutes" and that the property can "be cleaned and replaced right back," despite CRO's allegations regarding the resilience of the virus, its effect of requiring enhanced and continual cleaning that was not used or necessary before COVID-19, the impairment of the property's physical function created by the dangers to human health that SARS-CoV-2 poses, and the lack of any scientific basis for this suggestion in the record. R-15:8-12.

- The court suggested that CRO could "in theory, test each and every person before they come in and only allow people who don't have the virus in the restaurants, and then they could be in the restaurant." R-21:16-18; 21:20-21; 22:11-16.

- The court suggested that there would have been no impact from the virus so long as "the property was unexposed to people," despite the fact that it is irrelevant *how* the virus entered the property, only that it did. R-16:7-10.

Following this colloquy, the court found that *Roundabout*, was "binding preceden[t]," despite *Roundabout* having nothing to do with whether the presence

of a dangerous substance on insured property can cause physical loss or damage. R-40:22-41:2. Therefore, the court found that CRO had failed to allege physical loss or damage under the Policy. R-40:22-41:2; R-4-6. Additionally, although CRO requested leave to file an amended complaint to address the court's concerns, the court did not rule on this request at that time. R-34:20-23; *see generally* R-4-6.

Although CRO's initial complaint sufficiently alleged physical loss or damage, the court's colloquy at oral argument on Westport's motion to dismiss made clear that the court had not accepted CRO's allegations as true and construed all reasonable inferences in CRO's favor. Further, certain of the court's suggestions and views on CRO's allegations are inconsistent with prevailing science. Finally, the science of COVID-19 as well as CRO's understanding of its own losses has evolved since the early months of the pandemic when CRO filed its initial complaint. Therefore, on August 19, 2021, CRO requested leave to amend its complaint. R-1922-2013. That complaint was replete with detailed and robust allegations regarding, *inter alia*, (1) the actual presence of the virus on CRO's properties, (2) the ability of the virus to alter the air and attach to property, (3) the dangers of the virus and its various modes of transmission, (4) the resilience of the virus and the difficulty of removing the virus through previously routine cleaning (and even in-depth cleaning), (5) the significant efforts CRO undertook to repair, remediate and replace property, including by making physical alternations to its restaurants, and

(6) that the presence of the virus impaired the physical function of its properties and rendered them uninhabitable for their intended purpose – in person dining – and even resulted in the closure of dozens of those restaurants. *See generally* R-1932-44, ¶¶ 13-54.

Westport opposed the motion on September 14, 2021, and CRO submitted a reply on September 20, 2021. R-2014-2038, 2039-2052. The Court, in a decision without any analysis, denied CRO's motion for reargument and, in the alternative, to amend its complaint on September 23, 2021. R-47-48.

ARGUMENT

I. APPLICABLE LAW

A. Standard of Review

An appellate court reviews questions of contract interpretation de novo. *Dreisinger v. Teglasi*, 130 A.D.3d 524, 527 (1st Dep't 2015). Further, in examining a motion to dismiss a complaint for failure to state a claim under CPLR 3211(a)(7), the appellate court must afford the complaint a liberal construction and "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Schmidt-Sarosi v. Offices for Fertility & Reprod. Med., P.C.*, 195 A.D.3d 479, 480 (1st Dep't 2021) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994)). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to

prove its claims, does not play a part in the determination of a pre-discovery CPLR 3211(a)(7) motion to dismiss. *Feldman v. Port Auth. of New York & New Jersey*, 194 A.D.3d 137, 139-40 (1st Dep't 2021). A motion to dismiss based on documentary evidence under CPLR 3211(a)(1) must fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law and "conclusively establishes a defense to the asserted claims as a matter of law." *Schmidt-Sarosi*, 195 A.D.3d at 480 (quoting *Leon*, 84 N.Y.2d at 88).

New York appellate courts will review a trial court's decision to deny a party's motion to amend its pleadings for an abuse of discretion. *Taylor v. Deubell*, 60 N.Y.S.3d 739, 740 (4th Dep't 2017). CPLR 3025(b) provides that leave to amend a pleading should be "freely given." CPLR 3025(b); *see also LDIR, LLC v. DB Structured Prods., Inc.*, 172 A.D.3d 1, 4 (1st Dep't 2019) (granting leave to amend complaint under New York's liberal pleadings amendment standard); *Greenberg v. Wiesel*, 186 A.D.3d 1336, 1339 (2d Dep't 2020) (granting leave to file amended complaint where amended complaint alleges nearly identical causes of action as previous complaint). A court must grant leave to amend a pleading unless the proposed amendment is "palpably improper or insufficient as a matter of law" or if the amendment would cause the opposing party "prejudice or surprise resulting directly from the delay." *LDIR, LLC*, 172 A.D.3d at 4 (citation omitted). Further, a party opposing a motion for leave to amend a pleading "must overcome a heavy

presumption of validity in favor of permitting amendment." *Id.* (quoting *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep't 2012) (brackets omitted).

B. Standards of Insurance Policy Interpretation

"The construction and effect of a contract of insurance is a question of law to be determined by the court where there is no occasion to resort to extrinsic proof." *See, e.g., Oot v. Home Ins. Co. of Ind.*, 244 A.D.2d 62, 66 (4th Dep't 1998) (citations omitted); *Shants, Inc. v. Capital One, N.A.*, 124 A.D.3d 755, 759 (2d Dep't 2015). Undefined terms in an insurance policy are to be given their plain and common speech meaning. *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 257-58 (2016). Insurance contracts must be interpreted "consistent[ly] with the reasonable expectation of the average insured." *Id.* at 259.; *Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122 (2011); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003). The intent "is to be ascertained by examining the policy as a whole, and by giving effect and meaning to every term of the policy." *Oot*, 244 A.D.2d at 66. "An insurance contract should not be read so that some provisions are rendered meaningless." *S. P. v. Dongbu Ins. Co.*, 174 A.D.3d 911, 913 (2d Dep't 2019) (citation omitted).

Where an "agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Congregation Beth Shalom of Kingsbay v. Yaakov*, 130 A.D.3d

769, 770 (2d Dep't 2015) (citation omitted). However, any ambiguity in the policy language must be resolved against the insurer and in favor of coverage. *See, e.g.*, *Cragg*, 17 N.Y.3d at 122; *Westview Assocs. v. Guar. Nat'l Ins. Co*., 95 N.Y.2d 334, 339 (2000). Indeed, any reasonable reading of the policy in favor of the policyholder controls as a matter of law. *See, e.g.*, *Nat'l Football League v. Vigilant Ins. Co.*, 36 A.D.3d 207, 212-13 (1st Dep't 2006) (insured's "plausible interpretation" of exclusion supporting coverage "must be sustained"); *Woods v. Gen. Accident Ins.*, 292 A.D.2d 802, 803 (4th Dep't 2002) ("If an ambiguity exists, the insurer bears the burden of establishing that the construction it advances is not only reasonable, but also that it is the only fair construction." (citation omitted)).

II. CRO'S COMPLAINT, ASSESSED UNDER THE PROPER STANDARD, PLAUSIBLY ALLEGED "DIRECT PHYSICAL LOSS OR DAMAGE" TO INSURED PROPERTY

CRO's complaint is replete with robust allegations that the actual and imminent threat of COVID-19 at its Restaurants impaired the physical function of those restaurants, rendered them unusable for their intended purpose, and altered the surfaces of the properties and air within the properties, thereby causing physical loss and damage to insured property. Indeed, CRO alleged that the virus is (1) challenging to contain, (2) highly contagious, (3) deadly, (4) resilient, (5) a physical object that attaches to and causes harm to property, (6) can survive on various surfaces for weeks or months, and (7) compromises the physical integrity of the

structures to which it attaches by rendering them dangerous fomites for transmission of human disease. *See generally* R-54-61, ¶¶ 12-38; *see also generally* R-1932-44, ¶¶ 13-54. CRO also alleged that restaurants are "particularly susceptible to circumstances favorable to the spread of the virus" and that its losses were caused, in part, by the presence of the virus on its properties. R-56-57, 60, 68, ¶¶ 22, 36, 61; R-1936, 1944, 1951, ¶¶ 25, 52, 80. And, in case there was any doubt, CRO's proposed amended complaint includes pages of detailed paragraphs buttressing these allegations, including regarding the nature, modes of transmission and impact of the virus on CRO's properties. *See generally* R-1932-44, ¶¶ 13-54.

These allegations sufficiently and plausibly plead "physical loss or damage" based on decades of case law and the plain language of the Policy. In holding otherwise, the court not only ignored persuasive authority and the plain terms of the Policy, but it also failed to construe CRO's well-pled factual allegations as true and draw all reasonable inferences therefrom in the light most favorable to CRO as required.

A. The Actual Presence of COVID-19 in and on the Restaurants, Which Altered their Surfaces and Impaired Their Physical Function, Constitutes Physical Loss or Damage Under the Plain Terms of the Policy

It is axiomatic that "[i]nsurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average

insured." *Dean v. Tower Ins. Co. of New York*, 19 N.Y.3d 704, 708 (2012) (quoting *Cragg*, 17 N.Y.3d at 122). Further, courts "must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect." *In re Viking Pump*, 27 N.Y.3d at 257. Finally, in assessing the ordinary meaning of undefined terms in an insurance policy, courts often turn to their "normal dictionary meaning." *Innes v. Pub. Serv. Mut. Ins. Co.*, 106 A.D.2d 899 (4th Dep't 1984); *see also Colon v. Aetna Cas. & Sur. Co.*, 48 N.Y.2d 570, 575 (1980). Under these guiding principles, the term "direct physical loss or damage" encompasses losses caused by the presence of a dangerous substance in and on the Restaurants, such as the coronavirus, which renders the Restaurants unusable for their intended function.

The dictionary definition of "direct" includes "natural, straightforward" and a "close logical, causal, or consequential relationship."[4] Further, in the insurance context, the term "direct" means that a non-excluded risk proximately caused the loss. *See e.g.*, *New Hampshire Ins. Co. v. MF Global, Inc.*, 108 A.D.3d 463, 466 (1st Dep't 2013) (collecting New York cases dating back to 1945 in holding that "a direct loss for insurance purposes has been analogized with proximate cause"). "Physical" is defined as "of or relating to material things."[5] "Loss" includes "partial

[4] Direct, Merriam Webster, https://www.merriam-webster.com/dictionary/direct.
[5] Physical, Merriam Webster, https://www.merriam-webster.com/dictionary/physical.

or complete deterioration or absence of physical capability or function,"[6] "Damage" is defined as "loss or harm resulting from injury to person, property, or reputation."[7] "Property" is defined as "something owned or possessed specifically: a piece of real estate; the exclusive right to possess, enjoy, and dispose of a thing: ownership; something to which a person or business has legal title."[8] Thus, taken together, the ordinary meaning of the term "direct physical loss or damage" is simply that a "material thing" has impaired the physical function or capability of the insured's property, or a "material thing" has injured the property sufficient to impair "value or usefulness."

CRO's allegations that the actual presence of COVID-19 – a deadly, resilient, physical substance that attaches to and alters air and property – impaired the physical function of the Restaurants for their intended purpose and capability, fall squarely into these definitions and sufficiently plead "physical loss or damage." Indeed, a reasonable insured that purchased a property and business interruption insurance policy covering losses resulting from "physical loss or damage" would construe that term to encompass a circumstance where the insured has lost the ability to physically utilize its property due to the actual presence of a dangerous, physical substance on its property. *See Dean*, 19 N.Y.3d at 708 (insurance policies must be "interpreted

[6] Loss, Merriam Webster, https://www.merriam-webster.com/dictionary/loss.
[7] Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.
[8] Property, Merriam Webster, https://www.merriam-webster.com/dictionary/property.

according to common speech and consistent with the reasonable expectation of the average insured").

This conclusion is supported by numerous other terms and conditions in the Policy. For example, the Policy covers "physical loss or damage . . . caused by . . . radioactive contamination," despite the fact that radiation does not visibly alter property. R-109, Sec. IV.B(25). Similarly, the Policy's exclusions section bars coverage under certain circumstances for various "Types of Loss or Damage," including certain contaminants. R-126, Sec. VI.B. Thus, under its plain terms, the Policy itself describes dangerous, invisible substances as causing "Types of Loss or Damage." A contrary holding would require the Court to read the term "Loss or Damage" inconsistently across the Policy, which is contrary to bedrock principles of insurance policy interpretation. *Gallup, Inc. v. Greenwich Ins. Co.*, 2015 WL 1201518, at *10 (Del. Super. Ct. Feb. 25, 2015) (noting that an exclusion can help inform the Court as to the intent of the parties as to the scope of coverage).

Moreover, it would be non-sensical for Westport to have included in the Policy exclusions for invisible substances that could never cause a covered Loss under the Policy in the first place under Westport's interpretation of the term "physical loss or damage." Indeed, under Westport's interpretation, these exclusions would be superfluous and meaningless, which is also contrary to bedrock principles of insurance policy interpretation. *See Place v. Preferred Mut. Ins. Co.*, 190 A.D.3d

1208 (3d Dep't 2021) ("A provision's meaning must be determined upon consideration of the policy as a whole and the contract should not be read so that some provisions are rendered meaningless." (citation and quotation omitted)); *Atwells Realty Corp. v. Scottsdale Ins. Co.*, 2021 WL 2396584, at *6 (Del. Super. Ct. June 4, 2021) ("If presence of a virus could not be contained within these general provisions, the Virus Exclusion would be superfluous and rendered meaningless."); *U.S. Bank Nat. Ass'n v. Indian Harbor Ins. Co.*, 68 F. Supp. 3d 1044, 1050 (D. Minn. 2014), *amended sub nom. U.S. Bank Nat'l Ass'n v. Indian Harbor Ins. Co.*, 2015 WL 12778848 (D. Minn. Mar. 19, 2015) ("[T]he Court must interpret the loss definition and its exceptions consistently with all policy provisions—even the exclusions."). Thus, when read as a whole, the Policy makes clear that "physical loss or damage" is not limited to a *visible* alteration or damage to property, but can be caused by the presence of an invisible, yet dangerous substance that renders property unusable for its intended purpose or impairs its function. *Westchester Fire Ins. Co. v. Schorsch*, 129 N.Y.S.3d 67, 74 (2020), *appeal withdrawn*, 37 N.Y.3d 990 (2021) (in discerning the intent of the parties "the court must construe the policy as a whole").

Notably, insurance "[c]arriers have utilized the phrase direct physical loss for over fifty (50) years and courts have begged carriers to define the phrase to avoid the precise" interpretive issue presently before this Court. *Cherokee Nation v.*

Lexington Ins. Co., 2021 WL 506271, at *3 (Okla. Dist. Jan. 28, 2021). Nevertheless, "[d]espite these pleas and the known confusion surrounding the phrase 'direct physical loss,' [insurers] made no attempt to clarify or define that phrase within the [insurance] policy to avoid the [policyholder's belief or contention] that losses such as the closure of a business in response to the Pandemic would be covered – at least, not until it was too late." *Id*. And, as discussed below, during this same time, courts across the country held that the term "physical loss or damage" is triggered by the physical presence of a dangerous substance. Thus, not only does CRO's interpretation of the term "physical loss or damage" comport with the reasonable expectations of the average insured and the plain meaning of the Policy, but Westport – as drafter of the Policy – was on notice that its customers would reasonably interpret its policies to provide such coverage and made no effort to disabuse its customers of that notion. Instead, it collected hefty premiums only to pull the rug out from under its insureds – such as CRO – in their time of need.

Westport's primary retort is that the Policy's "Period of Liability," which ends when the insured property "could be repaired or replaced," suggests that the Policy only covers tangible, visible alterations to property that require repair or replacement. This argument misconstrues the Policy.

The actual presence of the virus on insured property, which physically attaches to and alters the air and surfaces within that property, constitutes a physical

alteration to that property necessitating repair or replacement. Indeed, CRO has alleged that it engaged in numerous steps to repair and remediate property, including making physical alterations to its Restaurants, installing barriers and filtration systems, and implementing strict cleaning procedures. R-1941-42, ¶¶ 42-45. Thus, CRO's alleged losses and the steps it took in the face of the physical loss or damage caused by the virus fall squarely into the Policy's period of liability.

Further, the words "repair" and "replace," cannot rewrite the term "physical loss or damage" to property, but must be harmonized with this language. *In re Viking Pump*, 27 N.Y.3d at 257. As the *Society* court observed in harmonizing the terms "physical loss of" property and "repair" or "replace" in the COVID-19 context:

> There is nothing inherent in the meanings of ["repaired" or "replaced"] that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss. If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to "repair" the space by installing those safety features. As another example, if a restaurant could mitigate the loss caused by a percentage-capacity limit by "replacing" some of its dining-room space by opening its adjacent banquet-hall room to increase the number of guests it could serve, then the restaurant would be expected to "replace" the loss of space by doing so.

In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig., 521 F. Supp. 3d 729, 731 (N.D. Ill. 2021); *see also Brown's Gym Inc. v. Cincinnati Ins. Co.*, 2021 WL 3036545, at *22 (Pa. Com. Pl. July 13, 2021) ("The 'period of restoration'

provision set forth in the 'extra expense' coverage . . . was arguably satisfied by Brown's repairs and remedial measures in the form of 'the installation of partitions' and 'handwashing/sanitation stations' and other actions undertaken to renovate the premises in order to make the property safe for public use."); *Ungarean, DMD v. CNA*, 2021 WL 1164836, at *8 (Pa. Com. Pl. Mar. 25, 2021) ("[I]n order to 'replace' or 'rebuild' unused space due to social distancing protocols, businesses might choose to buildout new spaces . . . or rearrange existing spaces in order to increase the amount of business they can safely handle during these difficult times.").

Here, CRO was forced to physically transform its covered properties in response to COVID-19 to ensure the safety of its workers and protect its properties. R-59, 60 ¶¶ 31, 33; R-1941-42, ¶¶ 42-45. Thus, as alleged in CRO's complaint, CRO did engage in the repair and replacement of its property contemplated by the period of liability and nothing about the period of liability somehow transforms the nature of the coverage afforded by the Policy. In fact, CRO's allegations regarding its response to the presence of the coronavirus on its properties strongly reinforces that CRO suffered "physical loss or damage."

B. The Actual Presence of COVID-19 in and on the Restaurants Rendering them Unusable for Their Intended Function Constitutes Physical Loss or Damage Under Decades of Well-Reasoned Case Law

That CRO's allegations satisfy the term "physical loss or damage" is supported by decades of case law from across the country. These cases, which

involve a range of substances including E.coli bacteria, asbestos, dangerous vapors, odors, salmonella, and carbon monoxide, make clear that the presence of a noxious substance on insured property rendering that property unusable for its intended function constitutes physical loss damage.[9]

For example, in *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of America*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), ammonia discharged into

[9] *See, e.g., Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920 (6th Cir. 1957) (radioactive dust and radon gas); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (en banc) (gasoline vapors); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396 (D. Minn. 1989) (health-threatening organisms); *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C.4th 271 (Pa. Com. Pl. 1992) (oil); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (methamphetamine fumes); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So.2d 600 (Fla. Dist. Ct. App. 1995) (unknown pollutant); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, 1996 WL 1250616 (Mass. Super. Mar. 15, 1996) (oil fumes); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (asbestos); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide); *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. App. Ct. 1999), *as modified on denial of reh'g* (Dec. 3, 1999) (asbestos); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1999 WL 619100 (D. Or. Aug. 4, 1999) (mold or mildew); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001) (food treated with unapproved pesticide); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002) (asbestos and lead); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App. 2002) (methamphetamine vapors); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, 2002 WL 31495830 (D. Or. June 18, 2002) (mold); *Cooper v. Travelers Indem. Co. of Ill.*, 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E.coli); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005) (E.coli); *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714 (Tex. App. 2005) (mold); *Schlamm Stone & Dolan LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (Sup. Ct. 2005) (unpublished table decision) (dust and noxious particles); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.*, 2007 WL 464715 (D. Or. Feb. 7, 2007) (lead); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (odors); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (toxic gas); *Widder v. La. Citizens Prop. Ins. Corp.*, 82 So.3d 294 (La. App. 4th Cir. 2011), *cert. denied*, 76 So.3d 1179 (La. 2011) (lead contamination); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059 (D. Haw. 2013) (arsenic); *Netherlands Ins. Co. v. Main Street Ingredients, LLC*, 745 F.3d 909 (8th Cir. 2014) (salmonella in food); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (odor of cat urine).

the air of the insured's packaging facility rendering it unusable until the ammonia dissipated. The court held that the "ammonia discharge inflicted 'direct physical loss of or damage to' [the insured's facility.]" *Id.* at *6-7. The court observed that "property can be physically damaged . . . when it loses its essential functionality" due to something being physically altered or transformed, such as the air by ammonia, asbestos, dangerous gases, unpleasant odors, or toxic gases. *Id*. at *5-6.

Similarly, in *Hardinger*, 131 F. App'x 823, the Third Circuit Court of Appeals found that whether bacteria in the well of a home rendered the home functionally uninhabitable presented a question of fact as to whether the physical loss or damage prong had been satisfied and, thus, reversed the district court's grant of summary judgment in favor of the insurer.[10] These cases are emblematic of cases across the country concluding that the actual presence of an invisible, yet dangerous substances on insured property that renders the property uninhabitable for its intended function constitutes physical loss or damage.

[10] This case followed the Third Circuit's decision in *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002). There, the Court found that "contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility" would constitute physical loss or damage. However, the Court affirmed the grant of the insurer's motion for summary judgment because the evidence did not satisfy that standard. Here, however, in the context of a motion to dismiss, this standard necessitates the denial of Westport's motion.

Although neither the New York Court of Appeals nor this Court have squarely addressed this issue, numerous New York courts have issued decisions that are in accord with this decades-old consensus. For example, in *Pepsico, Inc. v. Winterthur International American Insurance Co*., 806 N.Y.S.2d 709 (2d Dep't 2005), the insured sought coverage when its beverages were rendered unsellable by the introduction of a faulty ingredient. The Second Department rejected the notion that "to prove 'physical damages' the [insured] must prove that 'there has been a distinct demonstrable alteration of [the] physical structure [of the insured's products] by an external force.'" *Id.* at 711. Instead, the court found that it was sufficient that the introduction of this substance "seriously impaired" the "function and value" of the product. *Id.* This was despite the fact that the unmerchantability of the product was initially undetected and the product was *not* rendered unfit for human consumption.

Similarly, in *Schlamm Stone*, the New York Supreme Court held "the presence of noxious particles, both in the air and on surfaces in plaintiff's premises, would constitute property damage," reasoning that "[t]he carpets and other surfaces are property of plaintiff, and the presence [of] noxious particles thereon clearly impairs plaintiff's ability to make use of them." 2005 WL 600021, at *4-5. The same is true of *Newman Myers Kreines Gross Harris, P.C. v. v. Great N. Ins. Co*., 17 F. Supp. 3d 323 (S.D.N.Y. 2014). There, the court observed that the term "physical loss or damage . . . does not require that the physical loss or damage be tangible, structural

or even visible." *Id.* at 330. Rather, the court cited cases holding that even "invisible fumes" or the "contamination of well water" can satisfy this language. *Id.* However, because the insured in *Newman Meyers* had not experienced *any* physical impact to its property – invisible or otherwise – it found that these cases were distinguishable. *Id.* at 332-33. Thus, the court found that there was no coverage under *Roundabout* which, as discussed in detail below, is the applicable authority when a policyholder has alleged purely economic losses untethered to any physical impact to insured property. *Id.* at 330-31. In fact, there is not a single New York appellate authority holding that the presence of a noxious substance on insured property rendering that property uninhabitable and unusable for its intended function cannot constitute physical loss or damage.[11]

Given this well-established jurisprudence, it is unsurprising that many courts have applied this standard to deny insurers' motions to dismiss when a policyholder

[11] CRO anticipates that Westport will argue that *Cytopath Biopsy Laboratory, Inc. v. United States Fidelity & Guaranty Co*., 774 N.Y.S.2d 710 (1st Dep't 2004) stands for this proposition. This is incorrect. Although a lab in *Cytopath* was shut down following the release of "noxious fumes," it "was closed for only a few hours, and could have returned to operation promptly had the pipe been repaired expeditiously." *Id*. at 710-11. Furthermore, the property was not rendered unusable by the fumes. "[T]he real losses claimed . . . resulted from refusal by the authorities to permit resumption of operations" until "a more acceptable ventilation system was installed." *Id*. at 711. Unlike the fumes in *Cytopath*, the virus is not a temporary inconvenience; it is persistent and continues to threaten and harm the Restaurants, which were closed not for hours but for months. And tellingly, the principal decision on which *Cytopath* relies is *Roundabout*, which, as explained below, addressed coverage when the policyholder's loss does not stem from a physical impact to property.

has alleged the actual presence of COVID-19 on insured property.[12] For example, in *Brown's Gym*, the court exhaustively reviewed the interpretive history of the term "physical loss or damage":

> [p]rior to the onset of the COVID-19 pandemic, courts throughout the country adopted the contamination theory in recognizing that the existence of odors, bacteria, and

[12] *See, e.g., Life Time Inc., v. Zurich Am. Ins. Co.*, No. 27-CV-10599 (Minnesota); *Urogynecology Specialist of Fla., LLC v. Sentinel Ins. Co.*, 489 F. Supp. 3d 1297 (M.D. Fla. 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *Indep. Barbershop, LLC v. Twin City Fire Ins. Co.*, 499 F. Supp. 3d 331 (W.D. Tex. 2020); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360 (E.D. Va. 2020); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Aug. 13, 2020); *Chapparells Inc v. Cincinnati Ins. Co.*, No. CV-2020-06-1704, *slip op.*, (Ohio Com. Pl. Oct. 21, 2020); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, 2020 WL 7258114, (Ohio Com. Pl. Nov. 17, 2020); *JGB Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023 (D. Nev. Nov. 30, 2020); *Wagner Shoes, LLC v. Auto-Owners Ins. Co.*, 2020 WL 7260032 (N.D. Ala. Dec. 8, 2020); *Baldwin Acad., Inc. v. Markel Ins. Co.*, 2020 WL 7488945 (S.D. Cal. Dec. 21, 2020); *Humans & Res., LLC v. Firstline Nat'l Ins. Co.*, 512 F. Supp. 3d 588 (E.D. Pa. 2021); *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, 500 F. Supp. 3d 565 (E.D. Tex. 2021); *Sylvester & Sylvester, Inc. v. State Auto. Mut. Ins. Co.*, 2021 WL 137006 (Ohio Com. Pl. Jan. 7, 2021); *Goodwill Indus. of Orange County, Cal. v. Phila. Indem. Ins. Co.*, 2021 WL 476268 (Cal. Super. Jan. 28, 2021); *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, 2021 WL 818659 (Cal. Super. Feb. 4, 2021); *McKinley Dev. Leasing Co. Ltd. v. Westfield Ins. Co.*, 2021 WL 506266 (Ohio Com. Pl. Feb. 9, 2021); *NeCo, Inc. v. Owners Ins. Co.*, 520 F. Supp. 3d 1175 (W.D. Mo. 2021); *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 521 F. Supp. 3d 729; *Sunstone Hotel Inv'rs, Inc. v. Endurance Am. Specialty Ins. Co.*, 522 F. Supp. 3d 690 (C.D. Cal. 2021); *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 522 F. Supp. 3d 457 (N.D. Ill. 2021); *Boardwalk Ventures CA, LLC v. Century-Nat'l Ins. Co.*, No. 20STCV27359, *slip op.*, (Cal. Super. Mar. 18, 2021); *S. Dental Birmingham LLC v. Cincinnati Ins. Co.*, 527 F. Supp. 3d 1341 (N.D. Ala. 2021); *Blarney, Inc. v. Cincinnati Ins. Co.*, 2021 WL 1745905 (Ohio Com. Pl. Mar. 23, 2021); *Thor Equities, LLC v. Factory Mut. Ins. Co.*, 2021 WL 1226983 (S.D.N.Y. Mar. 31, 2021); *Serendipitous, LLC/Melt v. Cincinnati Ins. Co.*, 2021 WL 1816960 (N.D. Ala. May 6, 2021); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.*, 2021 WL 1837479 (E.D. Pa. May 7, 2021); *Treo Salon, Inc. v. West Bend Mut. Ins. Co.*, 2021 WL 1854568 (S.D. Ill. May 10, 2021); *Cibus LLC v. Eagle West Ins. Co.*, 2021 WL 1566306 (D. Ariz. Jan. 21, 2021); *Atwells Realty*, 2021 WL 2396584; *Ross Stores Ins. v. Zurich Am. Ins. Co.*, 2021 WL 3700659 (Cal. Super. July 13, 2021); *JDS Const. Grp., LLC v. Cont'l Cas. Co.*, No. 2020 CH 5678, *slip op.*, (Ill. Cir. Ct. Aug. 12, 2021).

> other imperceptible agents such as ammonia, salmonella, lead, e-coli bacteria, and carbon-monoxide, may constitute physical damage or loss to a property if its presence renders the structure uninhabitable or unusable, or essentially destroys its functionality.

2021 WL 3036545, at *16. Based on this well-established jurisprudence and the court's careful review of the policy, the court denied the insurer's motion to dismiss.

Similarly, both the Eighth and Ninth Circuit Courts have tacitly recognized that the actual presence of COVID-19 on insured property can constitute physical loss or damage. Specifically, in *Oral Surgeons, P.C. v. Cincinnati Insurance Co*., 2 F.4th 1141 (8th Cir. 2021), the Eighth Circuit Court of Appeals affirmed a grant of an insurer's motion to dismiss where the policyholder had not alleged that the virus was present on or even threatened its insured property. The court's basis for its conclusion was that "there must be some physicality to the loss or damage of property—*e.g*., a physical alteration, physical contamination, or physical destruction." *Id*. at 1144. Similarly, in *Selane Products, Inc. v. Continental Casualty Co.*, 2021 WL 4496471 (9th Cir. Oct. 1, 2021) the Ninth Circuit Court of Appeals affirmed a grant of an insurer's motion to dismiss, observing that the policyholder's argument that a microscopic organism can cause physical loss or damage "is unavailing because [the policyholder] did not allege that SARS-Cov-2 was present on its property to cause any damage." *Id.* at *1. The Ninth Circuit cited favorably to the Eighth Circuit on this point. These cases suggest that if a policyholder – like

CRO here – alleged that its losses were caused by the actual presence of the virus on insured property, the result would be different.

Insurers – including Westport – have gone to great lengths to suggest the existence of a tide of opinions in their favor on whether COVID-19 can cause physical loss or damage. Yet, in many of the cases where insurers have moved to dismiss the policyholder had not alleged that its losses were caused by the actual or even threatened presence of the virus on insured property, and/or the policy included a standard virus exclusion not present in the Policy here. And even in the minority of cases where the policyholder alleged the actual presence of the virus and a court granted an insurer's motion to dismiss, the court typically did so based on reasoning and allegations not applicable here or by applying the wrong standard.

New York is a perfect example of this trend. Specifically, in many of the trial level cases in New York's state and federal courts addressing coverage for COVID-19 related losses as of the filing of this brief, the policyholder did not allege that the actual presence of the virus resulted in physical loss or damage.[13] In most of the

[13] *See 10012 Holdings Inc. v. Sentinel Ins. Co.*, 507 F. Supp. 3d 482 (S.D.N.Y. Dec. 15, 2020) (no allegation of virus on insured property); *6593 Weighlock Drive, LLC v. Springhill SMC Corp.*, 147 N.Y.S.3d 386 (Sup. Ct., Onondaga Cty. 2021) (same); *Benny's Famous Pizza Plus Inc. v Sec. Nat'l Ins. Co.*, 149 N.Y.S.3d 883 (Sup. Ct., Kings Cty. 2021) (same); *BR Rest. Corp. v. Nationwide Mut. Ins. Co.*, 2021 WL 3878991 (E.D.N.Y. Aug. 24, 2021) (same); *Broadway 104, LLC v. XL Ins. Am.*, 2021 WL 2581240 (S.D.N.Y. June 23, 2021) (same); *Chefs' Warehouse Inc. v. Liberty Mut. Ins. Co.*, No. 1:20-cv-04825 (S.D.N.Y. Sept. 15, 2021) (same); *Deer Mountain Inn LLC v. Union Ins. Co.*, 2021 WL 2076218 (N.D.N.Y. May 24, 2021) (same); *DeMoura v. Cont'l Cas. Co.*, 2021 WL 848840 (E.D.N.Y. Mar. 5, 2021) (same); *Elite Union Installations, LLC v. Nat'l Fire Ins. Co. of Hartford*, 2021 WL 4155016 (S.D.N.Y. Sept. 13, 2021) (noting that insured did not argue that

remaining cases where the policyholder alleged the actual presence of the virus or the court addressed that issue *sua sponte* in dicta, the decisions imposed arbitrary hurdles to coverage not found in the policy such as that a dangerous substance must permanently alter property to cause physical loss or damage,[14] turned on the applicability of a broad virus exclusion not present here,[15] were decided on a

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COVID-19 was actually present on insured property); *Food for Thought Caterers Corp. v. Sentinel Ins. Co.*, 524 F. Supp. 3d 242 (S.D.N.Y. 2021) (same); *Gammon and Assocs. Inc. v. Nat'l Fire Ins. Co. of Hartford*, 2021 WL 3887718 (S.D.N.Y. Aug. 31, 2021) (same); *Harry E. Bassett III v. Wesco Ins. Co.*, No. 512144/2020 (N.Y. Sup. Ct. Kings Cty. July 15, 2021) (same); *Island Gastroenterology Consultants PC v. Gen. Cas. Co. of Wisconsin*, 150 N.Y.S.3d 898 (Table) (Sup. Ct., Suffolk Cty. Aug. 25, 2021) (same); *J&S Kid's Wear Inc. v. Ohio Cas. Ins. Co.*, No. 2:20-cv-03121 (E.D.N.Y. Aug. 24, 2021) (same); *JD Cinemas, Inc. v. Northfield Ins. Co*., 2021 WL 2626973 (N.Y. Sup. Suffolk Cty. Mar. 5, 2021) (same); *Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Ins. Co. of the Midwest, Inc*., 2021 WL 1091711 (E.D.N.Y. Mar. 22, 2021) (same); *Kim-Chee LLC v. Phila. Indem. Ins. Co*., 2021 WL 1600831 (W.D.N.Y. Apr. 22, 2021) (same); *Michael Cetta, Inc. v. Admiral Indem. Co*., 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020) (same); *Michael J. Redenburg, Esq. PC v. Midvale Indem. Co*., 2021 WL 276655 (S.D.N.Y. Jan. 27, 2021) (same); *Mohawk Gaming Enters., LLC v. Affiliated FM Ins. Co*., 2021 WL 1419782 (N.D.N.Y. Apr. 15, 2021) (same); *Office Sol. Grp., LLC v. Nat'l Fire Ins. Co. of Hartford*, 2021 WL 2403088 (S.D.N.Y. June 11, 2021) (same); *Red Apple Dental PC v. Hartford Fin. Servs. Grp., Inc.*, No. 7:20-cv-03549 (S.D.N.Y. June 10, 2021) (same); *Rye Ridge Corp. v. Cincinnati Ins. Co*., 2021 WL 1600475 (S.D.N.Y. Apr. 23, 2021) (same); *Salvatore's Italian Gardens, Inc. v. Hartford Fire Ins. Co.*, 2021 WL 3162800 (W.D.N.Y. 2021) (same); *Slate Hill Daycare Ctr. Inc. v. Utica Nat'l Ins. Grp.*, No. 7:20-cv-03565 (S.D.N.Y. Aug. 30, 2021) (same); *Social Life Magazine, Inc. v. Sentinel Ins. Co*., No. 1:20-cv-03311-VEC (S.D.N.Y. May 22, 2020) (same); *Soundview Cinemas, Inc. v. Great Am. Ins. Grp.*, 142 N.Y.S.3d 724 (Sup. Nassau Cty. Feb. 8, 2021) (same); *Sportime Clubs, LLC vs. Am. Home Assurance*, No. 614493/2020 (N.Y. Sup. Ct., Suffolk Cty. July 1, 2021) (same); *Sullivan Cty. Fabrication Inc. v. Selective Ins. Co. of Am*., No. 20-cv-5750 (same); *Thill 13014, LLC v. Finger Lakes Fire & Cas. Co.*, 2021 WL 4027888 (N.Y. Sup. Ct. Erie Cty. June 17, 2021) (same); *Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.*, 142 N.Y.S.3d 903 (Sup. Ct., Orange Cty. Feb. 12, 2021) (same); *WM Bang LLC v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 4150844 (S.D.N.Y. Sept. 13, 2021) (same); *Abbey Hotel Acquisition, LLC v. Nat'l Sur. Corp.*, 2021 WL 4522950 (S.D.N.Y. 2021) (same).

[14] *See Buffalo Xerographix Inc. v. Sentinel Ins. Co.*, 2021 WL 2471315 (W.D.N.Y. June 16, 2021) (noting that COVID-19 does not cause physical loss or damage because "the coronavirus does not physically alter property in a permanent manner").

[15] *See 100 Orchard Street, LLC v. Travelers Indem. Ins. Co. of Am.*, 2021 WL 2333244 (S.D.N.Y. June 8, 2021) ("[T]he Policy contains a Virus Exclusion Clause that independently and unambiguously bars coverage of Orchard Street's business losses at issue.").

summary judgment standard not applicable here,[16] found that COVID-19 cannot cause physical loss or damage because it could simply be wiped away like dust – which is contrary to CRO's allegations, the current science of COVID-19, and the lived experience of hundreds of millions or people [17] – and/or incorrectly found that *Roundabout* barred coverage like the trial court did here.[18] Although each of these factors renders these cases readily distinguishable, as discussed, below, it is the last factor – the erroneous reliance on the inapplicable decision in *Roundabout* – that is the most troubling and appears to have influenced many of these decisions.

C. *Roundabout* Does Not Apply to CRO's Allegations

The flaw underlying numerous trial level decisions regarding coverage for COVID-19 related losses in New York – including the decision at issue in this appeal

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[16] *See Mangia Rest. Corp. v. Utica First Ins. Co.*, 148 N.Y.S.3d 606 (Sup. Ct., Queens Cty. Mar. 30, 2021) (holding that plaintiff's allegations were "not borne out by any proof that COVID-19 was ever found on the premises, so there exists no reason to assert that the virus contaminated, or 'damaged' anything at the property, let alone made it uninhabitable").

[17] *See Sharde Harvey, DDS, PLLC, v. Sentinel Ins. Co*., 2021 WL 1034259 (S.D.N.Y. Mar. 18, 2021) ("[C]ontamination by a virus does not constitute 'direct physical loss' where the property merely needs to be cleaned and routine cleaning and disinfecting can eliminate its presence."); *Tappo of Buffalo LLC v. Erie Ins. Co*., 2020 WL 7867553 (W.D.N.Y. Dec. 29, 2020) ("'[A]n item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'"); *Kim-Chee LLC*, 2021 WL 1600831, at *6 (comparing the coronavirus to the "easily remedied intrusion of road dust"); *Wellpath Holdings, Inc. v. XL Ins. Am., Inc*., 54589/2021 (N.Y. Sup. Ct., Westchester Cty. Oct. 4, 2021) (finding that the coronavirus "poses a temporary health hazard").

[18] *See Northwell Health, Inc. v. Lexington Ins. Co.*, 2021 WL 3139991, at *1 (S.D.N.Y. July 26, 2021) (relying on *Roundabout* to bar coverage and finding that the coronavirus does not cause physical loss or damage because the coronavirus "unlike invisible fumes and chemicals – does not 'persist' and irreversibly alter the physical condition of a property"); *Spirit Realty Capital, Inc. v. Westport Ins. Corp.*, 2021 WL 4926016, at *2 (S.D.N.Y. Oct. 21, 2021) (same).

– is that under *Roundabout*, 302 A.D.2d 1, losses stemming from the coronavirus cannot cause physical loss or damage as a matter of law. This is a fundamental doctrinal error that, if left uncorrected, will drastically reduce the insurance coverage historically available to policyholders in New York.

In *Roundabout*, the policyholder sought coverage for losses as a result of "off-site property damage." *Id.* at 4. Despite there being no physical impact to insured property, the policyholder argued that "physical loss or damage" encompassed its "loss of use" of its property. *Id.* at 5. *Roundabout* rejected that argument, holding that "losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* at 7. *Roundabout* did not address the distinct question of whether "physical loss or damage" can be caused by the actual presence of a dangerous substance on insured property. This is not only reflected in the *Roundabout* decision itself, but in the underlying briefing in that case, which never raised this issue.

Therefore, it might make sense to apply the reasoning of *Roundabout* to cases where the insured alleged that it suffered purely economic losses untethered to any physical impact to property. *Roundabout*, however, is inapplicable where, as here, a policyholder has alleged that its losses resulted from the actual presence of a dangerous, physical substance in and on its property. Indeed, *Roundabout* never purported to answer this question – nor could it, given the facts and arguments before

that court. Certain trial courts in New York, like the court here, have failed to appreciate this critical distinction.

Accordingly, this appeal presents an opportunity for this Court to correct a doctrinal error whereby certain New York courts have improperly extended this Court's decision in *Roundabout* to circumstances it was never intended to address. CRO respectfully requests that the Court rectify this error and, consistent with the plain terms of the Policy and case law from across the country, hold that CRO's allegations that the actual presence of a noxious substance – COVID-19 – rendered its properties unusable for their intended purpose are sufficient to plead "physical loss or damage."

D. The Trial Court Committed Numerous Reversable Errors in Granting Westport's Motion to Dismiss

In granting Westport's motion to dismiss, the trial court committed numerous reversible errors, including misapplying *Roundabout* and ignoring the standard applicable to the sufficiency of a motion to dismiss.

First, the primary basis for the trial court's dismissal of CRO's complaint was that *Roundabout* was binding precedent. However, as discussed, *Roundabout* does not apply here, let alone constitute binding precedent. Thus, this was reversible error.

Second, the trial court erred by failing to accept CRO's allegations as true and draw all reasonable inferences in CRO's favor. For example, the trial court suggested that CRO did not suffer physical loss or damage because (1) the Restaurants could be easily sanitized, (2) "people went to grocery stores who had COVID and the grocery stores weren't shut down," (3) CRO could "wipe down the tables every two minutes," (4) CRO could just keep everyone with COVID-19 outside of its Restaurants, and (5) CRO could ensure through testing every would-be patron that "no one else with the virus is allowed into the premises." R-11:10-14, 12:20-13:2, 13:6-9, 15:8-12, 16:7-10, 21:16-18, 21:20-21, 22:11-16. In essence, the trial court *sua sponte* developed its own factual record without giving CRO an opportunity to present evidence or expert analysis, and then measured CRO's allegations against the trial court's own opinions and theories. This runs contrary to the foundational standards applicable to reviewing the sufficiency of a complaint, which require that CRO's allegations be taken as true, and all reasonable inferences drawn in its favor. *Schmidt-Sarosi*, 195 A.D.3d at 480.

Indeed, the court's reasoning and analysis here illustrate why New York law imposes a high bar before allowing dismissal at the pleadings stage. For example, the trial court's theory that COVID-19 can be cleaned in a matter of minutes is not only contrary to CRO's allegations regarding the resilience of the virus, it also is contrary to prevailing science. R-1937-38, ¶¶ 28-29, 46. Similarly, whether grocery

stores could remain open with precautions such as mask wearing –in addition to being outside of the four corners of CRO's complaint – has no bearing on whether *restaurants* could safely stay open for mask-less in-person dining. Indeed, the only way to eat in a restaurant is to do so mask-less. Further, in addition to not providing a legally cognizable basis on which to deny coverage, the question of whether CRO could have tested every would-be patron prior to entry cannot be resolved without a presentation of the factual circumstances that the Restaurants faced in 2020.

In fact, if, as the trial court suggested, the only way that CRO could avoid, remediate and repair the physical impact of COVID-19 to its properties was by shutting them down or prohibiting patrons from entering the Restaurants, that is quintessential "physical loss or damage" and exactly what these types of policies are designed to cover. And to the extent the Court was using these hypotheticals to suggest that the impact to CRO's business was due to practical considerations regarding the management and containment of the virus, rather than tangible, visible, and physical damage to the properties, the court was creating a standard for "physical loss or damage" that has no foundation in the law or the Policy, and basing its ruling on a factual scenario of the Court's own invention, rather that the facts CRO alleged.

III. THE TRIAL COURT ERRED IN DENYING CRO'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

At the hearing on Westport's motion to dismiss, the trial court's questioning focused on the physicality of the virus, the nature of its impact on property, and

certain of CRO's allegations regarding whether and how the virus was present on insured property. The court also suggested that CRO's losses were due to mere practical considerations and could have been addressed by routine cleaning. Although CRO's original complaint adequately addressed these issues – particularly when all reasonable inferences are drawn in CRO's favor – CRO sought to address the court's concerns through an amended complaint. This amendment was particularly significant in this case given the evolving nature of the science of COVID-19 and CRO's own understanding of the nature of its losses. Indeed, CRO filed its initial complaint in the early months of the pandemic, when the science of COVID-19 was still in its infancy.

CRO's amended complaint was replete with detailed allegations regarding the nature, presence and impact of the virus on CRO's properties. For example, CRO's proposed amended complaint included pages of robust allegations that COVID-19 is a deadly, highly contagious, physical substance that alters the air, attaches to surfaces, alters surfaces, cannot be remediated through routine cleaning, physically attached to specific property within the Restaurants, was continuously reintroduced into the Restaurants, and was present in the Restaurants and rendered those restaurants unusable for their intended function. R-1932-44, ¶¶ 13-54. These allegations, which must be accepted as true, leave no doubt as to the nature and impact of COVID-19 on CRO's properties and sufficiently plead "physical loss or

damage." They were certainly not palpably insufficient or patently devoid of merit. *LDIR, LLC*, 172 A.D.3d at 4. Nevertheless, the trial court denied CRO's motion as "futile," in contravention of New York's liberal amendment standard for pleadings.

IV. NO EXCLUSION IN THE POLICY BARS COVERAGE

Although the trial court based its holding solely on the purported insufficiency of CRO's allegations of "physical loss or damage," Westport also argued at the tail end of its motion to dismiss that a scattershot of exclusions in the policy barred coverage. None of these exclusions, however, apply, particularly when they are construed narrowly and strictly against Westport, as they must be under bedrock principles of insurance policy interpretation. *Belt Painting*, 100 N.Y.2d at 383 ("[P]olicy exclusions are given a strict and narrow construction.").

A. The Contamination Exclusion Does Not Apply

Westport failed to include in the Policy a standard-form virus exclusion widely available in the insurance market since 2006, which expressly provided that the insurer "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." R-69-70, ¶ 66; R-1952-53, ¶ 86. Instead, it chose to include an exclusion in the Policy for "[l]oss or damage due to the discharge, dispersal, seepage, migration, release or escape of contaminants," with "contaminant" defined to include a "virus." R-128, Sec. VI.C(5). This exclusion,

however, only bars coverage for traditional environmental pollutants, as reflected in the lead-in language to the exclusion. Indeed, the terms "discharge, dispersal, seepage, migration, or release" are traditional terms of art in the pollution context and do not apply to the coronavirus.

Belt Painting is instructive. There, the insurer denied coverage for injuries caused by paint fumes based on an exclusion in the policy for the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time," with "pollutants" defined to include "fumes." *Belt Painting*, 100 N.Y.2d at 382. The Court of Appeals nonetheless held that the exclusion did not bar coverage. *Id.* at 387. The court reasoned "the terms used in the exclusion to describe the method of pollution—such as 'discharge' and 'dispersal'—are 'terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous waste.'" *Id*. The Court further reasoned "it strains the plain meaning, and obvious intent, of the language to suggest that these fumes, as they went from the container to the injured party's lungs, had somehow been 'discharged, dispersed, released or escaped.'" *Id*. at 388.

This holding, and its reasoning, apply with equal force here. The exclusion's lead-in language contains the same exact "discharge" clause as the one considered in *Belt Painting*. An ordinary businessperson reasonably would conclude that this exclusion does not apply because the virus was not "discharged, dispersed, released

or escaped" as those terms are commonly understood in the context of traditional environmental pollution, and particularly when the exclusion is construed narrowly and in favor of coverage. *In re Viking Pump, Inc.*, 27 N.Y.3d at 259 (noting insurance contracts must be interpreted "consistent[ly] with the reasonable expectation of the average insured"); *Belt Painting*, 100 N.Y.2d at 383 ("[P]olicy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer."). Thus, although the exclusion might apply if, for example, industrial waste containing viral matter was "discharged" or "dispersed" onto property causing loss or damage, it does not apply to a naturally occurring virus that cannot reasonably be said to have been "discharged," "dispersed" or "released" as those terms are commonly understood. At the very least, this is a reasonable interpretation of this exclusion and, therefore, controls as a matter of bedrock insurance law. *Nat'l Football League,* 36 A.D.3d at 212-13 (insured's "plausible interpretation" of exclusion supporting coverage "must be sustained").

Notably, courts have held that similar exclusions do not bar coverage in the COVID-19 context. In *JGB Vegas Retail Lessee*, the insurer moved to dismiss based on a "Pollution and Contamination Exclusion," which barred coverage for "contamination" and the "the actual or threatened release, discharge, dispersal, migration or seepage of POLLUTANTS at an INSURED LOCATION," with "Contaminants" and "Pollutants" defined to include a virus. 2020 WL 7190023, at

*3. The court rejected this argument, finding that the insurer had not "shown that it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here." *Id.*

Similarly, in *Urogynecology*, the insurer denied coverage based on an exclusion for "loss or damage caused directly or indirectly by . . . '[p]resence, growth, proliferation, spread or any activity of . . . virus.'" 489 F. Supp. 3d at 1301. The insurer argued "the unambiguous policy terms exclude coverage for . . . COVID-19." *Id*. at 1302. The court rejected this argument, emphasizing "the unique circumstances of the effect COVID-19 has had on our society." *Id*. at 1302-03; *see also Seifert v. IMT Ins. Co.*, 495 F. Supp. 3d 747, 752 n.6 (D. Minn. 2020) (holding an insurer's attempt to place the coronavirus within a pollution exclusion was "unavailing").

B. The Microorganism Exclusion Does Not Apply

Westport's reliance on a "Microorganism" exclusion is similarly misplaced. That exclusion bars coverage for loss or damage caused by "mold, mildew, fungus, spores or other microorganism of any type, nature, or description." R-128, VI.B(6). Westport contends that a virus is a "microorganism" and, thus, fits within the exclusion. But a microorganism is a living object. *Organism*, Merriam-Webster, https://www.merriam-webster.com/dictionary/organism (last visited October 7,

2021) ("a living being"). A virus, in contrast, is not alive and is not an organism. *Virus*, Merriam-Webster, https://www.merriam-webster.com/dictionary/virus (last visited Nov. 17, 2020) ("[N]onliving extremely complex molecules."); *Virus*, Britannica, https://www.britannica.com/science/virus (last visited Nov. 17, 2020) (explaining "viruses should not even be considered organisms, in the strictest sense, because they are not free-living—i.e., they cannot reproduce and carry on metabolic processes without a host cell"). Thus, COVID-19 is not encompassed by the term "microorganism."

This conclusion is supported by the cannon of construction known as *noscitur a sociis*, which dictates that words or phrases grouped in a list should be given related meaning. *See Harris v. Allstate Ins. Co*., 309 N.Y. 72, 76-77 (1955); *Nat'l Football League*, 36 A.D.3d at 213-14. Under this cannon of construction, the exclusion applies only to a "microorganism" of the same kind as "mold," "mildew," "fungus," and "spores." A virus does not fall into this category, which only encompasses living organisms (and, in particular, the kingdom of fungi). *See Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 2021 WL 4029204, at *11 (N.H. Super. Ct. 2021) ("The Microorganism Exclusion is not applicable to SARS-CoV-2, because a virus is not unambiguously understood to be a 'microorganism.'").

To the extent there is any debate or confusion on whether a virus constitutes a microorganism, the exclusion must be construed in favor of coverage. *See Sincoff*

v. Liberty Mut. Fire Ins. Co., 11 N.Y.2d 386, 390 (1962) (holding that where experts "disagree as to the meaning of [a] word, and the dictionaries contain varying connotations" the term "is capable of more than one meaning" and therefore, its meaning "must be resolved in favor of the insured"). Indeed, it is Westport's burden to "establish that the exclusion is stated in clear and unmistakable language" and "subject to no other reasonable interpretation." *Belt Painting*, 100 N.Y.2d at 383. Westport cannot possibly satisfy this burden, let alone as a matter of law, when plain dictionary definitions make clear that a virus is not a microorganism. Thus, this exclusion does not apply.

C. The Loss-of-Market Exclusion Does Not Apply

Westport asserted that an exclusion in the Policy for "delay or loss of market" bars coverage because CRO's losses were caused by the impact of the Orders on market demand. R-193-94. This argument fails for numerous reasons. First, the purpose of this exclusion is to bar coverage for "losses resulting from economic changes occasioned by…competition, shifts in demand, or the like; it does not bar recovery for loss of ordinary business caused by a physical destruction or other covered peril." *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235, 240 (S.D.N.Y. 2003), *aff'd as modified*, 411 F.3d 384 (2d Cir. 2005). Put differently, this exclusion distinguishes between business interruption losses caused by impacts to property, and business interruption losses caused solely by impacts to

demand having nothing to do with the insured premises. Thus, for example, if consumer attitudes simply shift away from an insured's product, resulting in losses, there would not be coverage under this exclusion. Here, CRO's losses did not result from competition or shifts in demand; they resulted from physical loss or damage caused, in part, by the virus. Indeed, if CRO could have somehow made its properties COVID-free zones where there was no risk of infection, consumers would likely have flocked to those restaurants and the Orders would not have restricted their operation.

Second, as interpreted by Westport, this exclusion would vitiate the Policy's coverage and render it illusory in contravention of New York law. *See Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co*., 34 N.Y.2d 356, 361 (1974) (rejecting insurer's exclusion interpretation because it would render coverage nearly illusory); *Lend Lease (US) Constr. LMB Inc. v. Zurich Am. Ins. Co*., 28 N.Y.3d 675, 684-85 (2017); *see also Ashland Hosp. Corp. v. Affiliated FM Ins. Co*., 2013 WL 4400516, at *11 (E.D. Ky. Aug. 14, 2013) (refusing to apply similar exclusion to business interruption losses resulting from overheating of policyholder's computer storage network, reasoning to do so would "swallow up" coverage entirely). *See also Scott Craven DDS PC v. Cameron Mut. Ins. Co.*, 2021 WL 1115247, at *3 (Mo. Cir. Mar. 9, 2021) (loss of market exclusion as applied to COVID-19 related losses would "vitiate" coverage); *Ungarean*, 2021 WL 1164836, at *14 (finding that loss of

market exclusion did not apply to COVID-19 related losses because "this exclusion would effectively eliminate coverage for any kind of loss and/or damage caused by any covered peril, which closes Plaintiff's business while it is being repaired").

For example, CRO alleged that the Orders, which was one cause of its losses, resulted from physical loss or damage caused by the virus to nearby properties. R-52, 60, ¶¶ 4, 37; R-1930, 1944 ¶¶ 4, 53. This would trigger the Policy's "Civil or Military Authority Coverage."[19] Accordingly, Westport's argument that this exclusion bars coverage because CRO's losses were caused by the Orders exemplifies why interpreting the exclusion as Westport suggests would render coverage illusory.

Third, the complaint pleads various causes of the loss, including the virus and the Orders. R-52, 59-61, ¶¶ 4, 29-38; R-1930, 1941-1944 ¶¶ 4, 41-53. Thus, even if, as Westport suggests, losses due solely to governmental orders would be barred by the loss of market exclusion, Westport cannot possibly establish that the exclusion bars coverage as a matter of law at the motion to dismiss stage. Indeed, the question of causation is a quintessential question of fact. *See Duane Reade*, 411

[19] The civil or military authority covers losses:

> incurred by [CRO] due to the necessary interruption of [CRO's] business, provided that: a. the interruption directly results from an order of a civil or military authority that prohibits partial or total access to insured location(s); and b. the order referenced above is caused by direct physical loss or damage as insured by th[e] policy to property, including property excluded under Property Not Insured.

R-123, Sec. V.H(11).

F.3d at 398 (noting that the insurer's "assertion that the 'loss of market' exclusion applies to Duane Reade's claim" because its losses were caused by a loss of market due to the collapse of the World Trade Center, rather than the physical loss or damage caused by the collapse, "creates, at most, a factual issue concerning the amount of loss Duane Reade may recover"); *see also* 7 Couch on Insurance § 101:59 (3d ed. 2021) ("[The need for a factfinder] is especially true in those instances in which more than one cause contributes to the subject injury, and reasonable persons could draw different conclusions regarding the question of which of the contributing causes is the proximate cause of the injury.").

D. The Reasons Not Covered Exclusion Does Not Apply

Westport's reliance on the "Reasons-Not-Covered" exclusion is similarly misplaced.[20] That exclusion simply reiterates that physical loss or damage is a pre-requisite to time-element recovery. Here, as discussed *supra*, CRO adequately pled physical loss or damage as a basis for its time element recovery and, thus, this exclusion does not apply.

[20] That exclusion provides:

> This POLICY does not insure against TIME ELEMENT loss for any period during which business would not or could not have been conducted for any reason other than physical loss or damage insured by this POLICY to INSURED PROPERTY.

R- 129, Sec. VI.D(1).

CONCLUSION

For the foregoing reasons, the trial court's decision granting Westport's motion to dismiss should be reversed and CRO's motion for leave to file an amended complaint should be granted.

Dated: November 8, 2021
New York, New York

Respectfully submitted:

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STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

CONSOLIDATED RESTAURANT OPERATIONS, INC.,

Plaintiff-Appellant,

– against –

WESTPORT INSURANCE CORPORATION,

Defendant-Respondent.

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1. The index number of the case in the court below is 450839/2021.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in New York Supreme Court, Westchester County.[1]

4. The action was commenced on or about August 5, 2020 by filing of a Summons and Complaint.

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[1] The action was transferred to the New York Supreme Court, New York County on December 11, 2020.

5. The nature and object of the action is breach of contract and a declaratory judgment.

6. This appeal is from a Decision and Order of the Honorable Jennifer G. Schecter, dated August 4, 2021, which granted Defendant Westport Insurance Corp.'s Motion to Dismiss the Complaint, and from a Decision and Order, dated September 23, 2021, which denied Plaintiff's Motion for Reargument and, in the Alternative, to Amend its Complaint.

7. This appeal is on the full reproduced record.